FILE COPY

NOV 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

ALBERT E. JAMES,
Attorney for the Petitioner.

Eynon Printing Co., Inc., Washington, D. C.

INDEX

Subject Index

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes	2-3
Statement of Case	4-5
Specification of Errors to be Urged	5-6
Summary of Argument	6-9
Argument	9-27
I. The statute is a taxing act. Its language is to be construed in the ordinary sense of the words involved and it is to be construed most liberally on behalf of the taxpayer	9-14
II. The transfer of the stock of the bus lines for the stock of C. Easman Jacobus, Inc., was an exchange	14-16
III. The stock of the bus companies given in exchange was "property"	16-17
IV. The transaction was in pursuance of a plan of reorganization	17-19
V. Bus and Transport Securities Corporation and C. Easman Jacobus, Inc., were "parties to a reorganization"	19-21
VI. The petitioner acquired a continuing interest in the property transferred	21-22
VII. Viewed as a transaction by C. Easman Jacobus individual, the transfer was within Section 112 (b) (3) of the Revenue Act of 1928	22-27
Conclusion	27

TABLE OF CASES CITED

	PAGE
Burnet v. Brooks, 288 U. S. 378	17
Commissioner v. Greene, 42 Fed. (2d) 852	15, 17
Crooks v. Harrelson, 282 U. S. 55	12
DeGanay v. Lederer, 250 U. S. 376	16
Delaware & Hudson v. Commissioner, 65 Fed. (2d) 292	12
Old Colony R. Co. v. Commissioner, 284 U. S. 552	10
Pinellas Ice & Cold Storage Co. v. Commissioner, 284 U. S. 462	18, 21, 24
United States v. Merriam, 262 U. S. 179	11
Watts v. Commissioner, 75 Fed. (2d) 981	19

STATUTES CITED

Judicial Code, Section 240 (a) as Amended by the Act of February 13, 1925	
Revenue Act of 1928, Sec. 112(a)	2
Sec. 112(b)	2
Sec. 112(b) (3)	2, 8, 23
Sec. 112(b) (4)	3, 6, 7, 10, 12, 13, 14, 17
Sec. 112(i)	3, 12
Sec. 112(i) (1)	3, 6, 7, 8, 10, 13, 18, 24
Sec. 112(i) (2)	3, 6, 7, 8, 10, 13, 24
Sec. 113(a) (6)	26
Revenue Act of 1926 Sec. 203(h) (2)	20

MISCELLANEOUS

Corpus Juris, 23 C. J. 184	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals is unreported except in the Record (pages 7-11). The opinion of the Circuit Court of Appeals (R. 15) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered July 3, 1935 (R. 19) (R. 15-18). A petition for a writ of certiorari was filed October 3, 1935 and was granted November 11, 1935. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is:

Whether the transfer by a corporation of its assets, consisting of stocks of bus transportation companies, to another corporation in exchange for all the capital stock of a corporation which in turn owned shares of the transportation corporation intending to continue and carry on the business of the said bus companies, constituted a reorganization within the meaning of Sections 112(b) (4) and 112(i) (1) and 112(i) (2) of the Revenue Act of 1928.

STATUTES

The statutory provisions pertinent to the above question are all contained in Section 112 of the Revenue Act of 1928 and are as follows:

"Sec. 112. Recognition of Gain or Loss.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under Section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.

(3) Stock For Stock On Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such

corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(i) Definition of reorganization.—As used in this section and Sections 113 and 115—

(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

STATEMENT OF FACTS

The facts as found by the Board of Tax Appeals which consisted of allegations in the petition admitted by the respondent's answer are as follows (R. 2-3, 7, 8, 9):

Prior to the transactions as hereinbelow set forth, C. Easman Jacobus was the owner of practically all of the stock of two corporations—The Butler-Newark Bus Line, Inc., and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said State, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized, under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corporation in exchange for all of its capital stock 2,500 shares 6 per cent cumulative preferred stock of the Public Service Corporation of New Jersey.

C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the

amount of 2,000 shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

Thereupon the Public Service Coordinated Transport Company, in pursuance of the said plan, transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner in the said year 1929 was $274,062.50.

Petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as hereinabove set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc., in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

SPECIFICATION OF ERRORS

(1) The Circuit Court of Appeals erred in holding that the exchange of property for stock above referred

to between the Public Service Coordinated Transport and the Bus and Transport Securities Corporation, this petitioner, was not a reorganization within the meaning of Sections 112(b) (4) and 112(i) (1) and 112(i) (2) of the Revenue Act of 1928.

(2) The Circuit Court of Appeals erred in holding and deciding that the petitioner received a taxable gain by reason of the exchange of its assets for all the capital stock of C. Easman Jacobus. That corporation in turn had as its sole asset shares of the Public Service Corporation of New Jersey which in turn was affiliated with and controlled the Public Service Coordinated Transport, the corporation to which the petitioner transferred its assets and from which it received such stock of C. Easman Jacobus, Inc.

(3) The Circuit Court of Appeals erred in affirming the judgment theretofore entered for the respondent, Commissioner of Internal Revenue, and erred in failing to reverse said judgment and in failing to direct the entry of an order reversing the said judgment.

(4) The Circuit Court of Appeals erred in affirming the deficiency in tax asserted by the Commissioner of Internal Revenue and in approving the order of the Board redetermining that deficiency.

SUMMARY OF ARGUMENT

The Statute here involved is a taxing act. Its language is to be construed in the ordinary sense of the

words involved and is to be construed most liberally on behalf of the taxpayer.

To conform with the statutory requirements laid down in Section 112, there must be an exchange, the thing exchanged by the transferor must be property. The transaction must be in pursuance of a plan of reorganization and the thing received must be stock or securities in another corporation which also is, under the definition contained in the statute, a party to the reorganization.

The transfer of the stock of the bus lines made by the petitioner for the stock of C. Easman Jacobus, Inc., was an exchange. The stock of the bus companies, which prior to the transfer was owned by the petitioner, was property. The transaction is established by the facts as being in pursuance of a plan, and the steps taken since they conform to the statutory requirements constituted a plan of reorganization. The Bus and Transport Securities Company, the petitioner here, and C. Easman Jacobus, Inc., were both under the definition contained in the statute, parties to the reorganization.

The statutory provisions relied upon to bring this case as it actually exists on the facts within the reorganization provision are Section 112(b) (4) and Section 112(i) (1) (A) and Section 112(i) (2).

Taking the facts as they are, the transaction on which the Commissioner asserts a tax against the petitioner was literally within the terms of the reorganization provisions of the statute and those provi-

sions exclude the transaction from immediate taxation. The petitioner, in addition to being literally within the statute, acquired through the preferred stock of Public Service Corporation of New Jersey, owned by C. Easman Jacobus, Inc., a continuing interest in the bus lines transferred to Public Service Coordinated Transport, the subsidiary of the Public Service Corporation of New Jersey.

If all intermediate entities are swept aside, if only the ultimate *personal* result is considered, the result is the same. If it were assumed that C. Easman Jacobus as a individual transferred the stock of the Bus Companies, originally owned by him, to Public Service Corporation of New Jersey, in exchange for preferred capital stock of that corporation, that transaction, had it occurred, would also have been within the reorganization provisions, namely Section 112(b) (3) and Section 112(i) (1) (A) and Section 112(i) (2).

Taking the facts as they are and looking at the ultimate results, C. Easman Jacobus, the individual, acquired a continuing interest in the bus lines transferred to the Public Service Corporation by reason of his ownership of the capital stock of the petitioner and through the petitioner his control of the capital stock of C. Easman Jacobus, Inc., and its ownership of the preferred capital stock of Public Service Corporation of New Jersey, and he acquired nothing else.

Thus viewed either as a reorganization fitting exactly into the terms and conditions of the statute or fitting into the test of continuing interest held by the

transferor, either corporate or individual, the transaction involved in this case is a reorganization as defined by the statute and that being true, no taxable gain was realized by the petitioner in connection therewith.

ARGUMENT

I.

The Statute Is a Taxing Act. Its Language Is to Be Construed in the Ordinary Sense of the Words Involved and It Is to Be Construed Most Liberally on Behalf of the Taxpayer.

Reduced to the simplest terms, the question in this case is whether the exchange by the petitioner of its property for all the capital stock of C. Easman Jacobus, Inc., resulted in taxable gain. The facts disclosed two preliminary steps which are not material to the determination of the case, but assist in the understanding of the third step around which the issue devolves. Briefly, the situation set forth by the facts is as follows:

One C. Easman Jacobus was in 1929 the owner of the capital stock of two bus lines which the Public Service Corporation of New Jersey desired to acquire. In 1929, a plan for that acquisition was devised and executed. Jacobus organized the petitioner corporation and exchanged for its stock all the capital stock of the bus lines which he then owned. A subsidiary of the Public Service Corporation of New Jersey organized a corporation, C. Easman Jacobus, Inc., and transferred to it 2500 shares, 6% cumulative pre-

ferred stock of the Public Service Corporation of New Jersey.

The petitioner then transferred to the subsidiary of the Public Service Corporation of New Jersey, the capital stock of the bus lines which it then owned and received in exchange therefor the capital stock of C. Easman Jacobus, Inc. It is this last transaction which the Commissioner of Internal Revenue asserts resulted in taxable gain and which the taxpayer petitioner claims was a non-taxable transaction squarely within the terms of Section 112(b) (4) as defined in Section 112(i) (1) and (2) of the Revenue Act of 1928.

The above transaction will be shown to be step by step within the literal words of every applicable provision of the statute. The statute is specific and concrete and when applied in the light of specific transactions, is perfectly clear and unambiguous. The words used are not only words of common meaning and understanding, but in most instances have received judicial construction. Words in taxing acts are to be read, where possible, in their ordinary meanings and where there is any doubt, words in a taxing act must be given that sense and that construction most favorable to the taxpayer, *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 561. The above case concerned the meaning of "interest". The Commissioner was undertaking to include as income in that case apportioned bond premiums derived from sales of bonds in

earlier taxable periods. This Court there said (page 561):

> "If there were doubt as to connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer."

Included in the citation of authority in support of the foregoing, was *United States* v. *Merriam*, 263 U. S. 179, 187-188. Upon this point this Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153. The rule is stated by Lord Cairns in Partington v. Attorney-General, L. R. 4 H. L. 100, 122:
>
> "'I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax,

> cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'' And see Eidman v. Martinez, 184 U. S. 578, 583."

The foregoing rule was again applied in a most significant case in *Crooks* v. *Harrelson*, 282 U. S. 55.

The Circuit Court of Appeals for the Second Circuit in *Delaware and Hudson* v. *Commissioner*, 65 Fed. (2d) 292, 293-294, excellently stated the rule of construction which should be applied in dealing with our detailed taxing laws in general. It said:

> "A taxing system so detailed and particular as ours does not admit of the same flexibility of interpretation as one in more general terms. Perhaps its very refinement may defeat its purposes; elaboration often does. But the more articulate the expression, the less room remains for intendment beyond the words used. This is the penalty inherent in a progressive specification of any general meaning; what is left out is not to be supplied."

With the foregoing rules of construction in mind, the petitioner submits the pertinent provisions of Section 112(b) (4) and Section 112(i) of the Revenue Act of 1928 with interpolations of the names of the

several corporations showing how perfectly the transaction involved in this case fits within the literal terms of the statute. As so interpolated, Section 112(b) (4) reads as follows:

> "No gain or loss shall be recognized if a corporation"—*Bus and Transport Securities Corporation*—"a party to a reorganization exchanges property,"—*the capital stock of Butler-Newark Bus Line, Inc., and Boonton-Mt. Lakes Bus Lines, Inc.*—"in pursuance of the plan of reorganization, solely for stock or securities in another corporation"—*C. Easman Jacobus, Inc.*—"a party to the reorganization."

Pursuing the same interpolation, the transaction falls within the definition of a plan of reorganization as follows:

> (Section 112(i) (1). "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation"—*Bus and Transport Securities Corporation*—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—*C. Easman Jacobus, Inc.*

Further pursuing the above, the interpolation in Section 112(i) (2) is as follows:

> "The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation"—*Bus and*

Transport Securities Corporation—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—*C. Easman Jacobus, Inc.*

II.

The Transfer of the Stock of the Bus Lines for the Stock of C. Easman Jacobus, Inc., Was an Exchange.

Proceeding with the analysis of Section 112(b)(4), it will be noted that the Section is itself headed "(b) Exchanges solely in kind". We are to determine therefore whether the transfer of the stock of the bus lines for the stock of C. Easman Jacobus, Inc., was an exchange.

The Board of Tax Appeals states that the question presented "is whether the petitioner realized a taxable gain from the exchange of certain stock" (R. 7). In the pleadings (R. 3) and in the Board Findings (R. 8) the transaction is carefully described in terms of the steps taken without incorporating into the description any language which could be construed to be a conclusion, either of fact or law. The language used clearly discloses that an exchange occurred. That language (R. 8) is "Thereupon the Public Service Coordinated Transport in pursuance of the said plan transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport all the said capital stocks * * *" of the Bus Lines.

The transaction is an exchange as defined by the

authorities. 23 C. J. 184 defines exchanges of property as follows:

> "An exchange of property is a mutual transfer of one or more pieces of property for property other than money."

A transaction involving the tax free exchange provision of the statute in the Revenue Act of 1921 has been applied by the Second Circuit. *Commissioner* v. *Greene*, 42 Fed. (2), 852.

The statutory provision construed in the above case was Section 202 of the Revenue Act of 1921 which, so far as material, reads as follows:

> "(c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized * * * (1) When any such property held for investment, * * * is exchanged for property of a like kind or use;"

The taxpayer in that case exchanged stock which he held for bonds. In the course of the discussion, the Court said (page 853):

> "There was no money received by the respondents in the trust, only bonds, for the stock. The statute provides for nontaxable exchanges in which the property received has a 'readily realizable market value.' The parties to an exchange are fully justified in adopting the market value as a basis for the exchange and still remain within the contemplation of the statute. * * *

They truly exchanged these securities, as 'property held for investment.' "

III.

The Stock of the Bus Companies Given in Exchange Was "Property."

That capital stock of a corporation is property seems almost too elementary to require citation of authority. In *DeGanay* v. *Lederer*, 250 U. S. 376, the question was presented whether under the Income Tax Act of 1913, income derived from stocks and bonds physically situated in the United States was income from property therein. The Court defines such securities as property in the following language (pages 380-381):

> "A learned argument is made to the effect that the stock certificates, bonds and mortgages are not property, that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of the congressional intent in using the term 'property' in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. * * *

"We have no doubt that the securities, herein involved, are property."

In *Burnet* v. *Brooks*, 288 U. S. 378, 391, the foregoing decision was cited and quoted with specific approval. Moreover, in *Commissioner* v. *Greene*, 42 Fed. (2) 852, both the stocks and the bonds involved in the exchange in that case were implicitly recognized as property and as property of the character and kind referred to in the statute.

IV.

The Transaction Was in Pursuance of a Plan of Reorganization.

The existence of a plan is established as a fact (Record 2-3, 7, 8-9), in virtually every paragraph of the agreed facts

"A plan for the said acquisition, hereinafter outlined, was devised and executed."

"—the C. Easman Jacobus, Inc., a corporaiton, and in pursuance of the plan transferred—"

"—all in pursuance of the said plan."

"—the Public Service Coordinated Transport Co. in pursuance of the said plan transferred to petitioner—".

The transaction being in pursuance of a plan as established by the facts pleaded, admitted and found by the Board, the question of law remaining is whether there was a "plan of reorganization" within the meaning of Section 112(b) (4). To determine that question, we must consider the definition of re-

organization as contained in Section 112(i) (1). In the parenthetical clause of that Section a "reorganization" is defined as "the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation." It is established as a fact (R. 3, 7, 8) that the Public Service Coordinated Transport in pursuance of the said plan transferred to petitioner all the capital stock of C. Easman Jacobus, Inc.

The language above quoted defining the specific transaction involved in this case is clear, unambiguous and requires no construction. The first clause within the parenthesis covers the exact transaction involved in this case. The plan therefore referred to in the facts was of necessity a plan of reorganization since it was a plan, which when carried out, represented a defined reorganization as specifically set out in the statute.

Pinellas Ice and Cold Storage Co. v. *Commissioner*, 287 U. S. 462, 469-470, interpreted this clause and defined a reorganization as something broader than a merger or consolidation and held that the clause included transactions of a character not ordinarily embraced within those terms. The definition of a reorganization as construed in that case attaches only one further condition, namely that

> "—to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to

ownership of its short-term purchase-money notes."

There is nothing mysterious in the words "plan of reorganization." The Circuit Court of Appeals in *Watts* v. *Commissioner*, 75 Fed. (2d) 981-982, disposed succinctly and definitely of what is meant by "a plan of reorganization", when it said:

> "The plan of reorganization was the contract made and performed."

V.

Bus and Transport Securities Corporation and C. Easman Jacobus, Inc., Were "Parties to a Reorganization."

As above indicated, it is important not only that there be an exchange, that property be exchanged, that such exchange of property shall be in pursuance of a plan of reorganization and that stock in another corporation shall be received, but it is essential that both the corporation receiving the stock and the corporation whose stock is so received shall be "parties to the reorganization." We turn, therefore, to Section 112(i) (2) for the definition of a "party to a reorganization" which includes specifically "both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation." Since Bus and Transport Securities Corporation received all the stock of C. Easman Jacobus, Inc. (R.

3, 7, 8) by reason of the transaction in issue, both corporations were parties to a reorganization within the meaning of the statute and all the terms of Section 112(b) (4) were, therefore, satisfied by the transaction as it was actually carried out.

Support is found for the above interpretation, if any is necessary, in the brief for the government in *Pinellas Ice and Cold Storage Co.* v. *Burnet* at page 22 where the government was drawing the important distinction between reorganizations involving the acquisition of property generally as distinguished from corporate stock and pointed out that under Section 203 (h) (2) of the 1926 Revenue Act (corresponding to Section 112(i) (2) of the 1928 Act) both corporations are parties to a reorganization where the stock of one is acquired by the other. In drawing that distinction, the government in that brief (page 22) said:

> "It will be noted that the definition specifically includes both parties in the case of one of the transactions mentioned in Section 203(h) (1) (A) but does not refer to the transaction which covers this case. Section 203(h) (1) (A), in the parenthetical clause, deals with two transactions, namely, (1) the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, and (2) the acquisition by one corporation of substantially all the properties of another. Section 203(h) (2) provides that in the case of the first transaction both corporations shall be deemed to be parties to the reorganization, but it

is silent as to whether both corporations in the second transaction are to be deemed parties to the reorganization."

The points of the definition are established. There was an exchange, the stock of the bus companies given in exchange was property, the transaction was in pursuance of a plan, the plan was a plan of reorganization, the party acquiring stock and the corporation whose stock was acquired were parties to a reorganization. No more complete, literal compliance with statutory language could be imagined.

VI.

The Petitioner Acquired a Continuing Interest in the Property Transferred.

Taking the facts as they are, the petitioner acquired literally within the terms within the statute, all of the capital stock of C. Easman Jacobus, Inc. and by so doing met all the requirements of a reorganization as set forth in the statute. Beyond and above meeting the literal terms of the statute, the petitioner in this transaction met also the further condition attached by this Court in *Pinellas Ice and Cold Storage Co.* v. *Commissioner*, 287 U. S. 462. That condition is not yet precisely defined but is expressed at the present time only in the most general terms "that the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of short-term purchase-money notes." Certainly the acquisition directly of capital stock of

the purchasing company would be such an interest and certainly also the acquisition of all the capital stock of a corporation, having as its sole asset capital stock of the purchasing company must be such an interest. Petitioner here did not acquire money, it did not acquire notes, it did not acquire securities in the general sense of the term, it did acquire through C. Easman Jacobus, Inc. preferred capital stock of the Public Service Corporation of New Jersey, the real purchaser of the bus company stocks and therefore through the stock of C. Easman Jacobus, Inc., so acquired by the petitioner it acquired an interest in the purchasing company. Its investment was still at the risk of the same general enterprise as had been its preceding interest in the stock of the two bus lines given in exchange. The only difference was that its first property was confined to two specific bus lines operating within a narrow radius in northern New Jersey. After the transaction was completed, the petitioner had an interest in all the varied transport and other activities of the Public Service Corporation of New Jersey, including the activities it had disposed of through the transfer of its bus companies' shares.

VII.

Viewed as a Transaction by B. Easman Jacobus, Individual, the Transfer Was Within Section 112 (b) (3) of the Revenue Act of 1928.

The opinion below (Record 15-18) places the decision of the Circuit Court of Appeals for the Third

Circuit upon the single ground that the transaction here was in effect one between C. Easman Jacobus as an individual and Public Service Coordinated Transport Co. and, had it been carried out in that form would have represented a taxable transaction. It is clear from the facts that the transaction was actually, when viewed in that light between C. Easman Jacobus as an individual and Public Service Corporation of New Jersey, which for operating reasons of its own, selected Public Service Coordinated Transport as the medium for the exchange. Viewed as a transaction between the individual C. Easman Jacobus and Public Service Corporation of New Jersey and ignoring intermediate entities, this transaction, had its consummation been in that form, would have fallen clearly within the terms of Section 112(b) (3) of the Revenue Act of 1928 and no tax liability would have attached.

Interpolating in Section 112(b) (3) for this imagined transaction in the same manner as has been interpolated in the actual transaction in pages 13-14 of this Brief, Section 112(b) (3) reads as follows:

> "(3) Stock for Stock on Reorganization—No gain or loss shall be recognized if stock or securities in a corporation" (*the bus company stocks*) "a party to a reorganization" (*the bus companies*) "are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation" (*Public Service Corporation of New Jersey*) "a party to the reorganization."

The definition of a reorganization as contained in Section 112(i) (1) interpolated under these assumed facts is as follows:

> "(i) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation" (*Public Service Corporation of New Jersey*) "of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation," (*the bus companies*).

Interpolating further in Section 112(i) (2) the assumed transaction meets the test of "a party to the reorganization."

> "(2) The term 'a party to a reorganization' includes * * * both corporations in the case of an acquisition by one corporation" (*Public Service Corporation of New Jersey*) "of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation" (*all the stocks of the bus companies*).

The fears of the Circuit Court that all taxation of gains are at an end if the decision favors the petitioner in this case are wholly groundless. The continuing interest test imposed by this Court in *Pinellas Ice and Cold Storage* v. *Commissioner*, 287 U. S. 462, is a complete bar to any such possibility. If the stock held by C. Easman Jacobus, Inc. had been other than stock of Public Service Corporation of New Jer-

sey, the purchaser, the requirement of a continuing interest would not have been met and the transaction would have been taxable. It would not be possible to accomplish a reorganization of the type here involved by supplying the corporation all of the stock of which is acquired with either cash or a miscellaneous group of investments foreign to the corporation acquiring the assets of the seller. But when the stock acquired in the exchange represents an interest in the purchaser in the form of capital stock, directly or indirectly, the transaction is a reorganization, whether viewed in its technical aspects or whether, stripped of all machinery, it is viewed with reference to the thing actually done.

It is important to bear in mind that the transaction involved here was at arms length between strangers. The Public Service Corporation took over the bus operations previously conducted by Jacobus, and made him in effect a stockholder in its enterprises. That was precisely the kind of transaction intended to be treated as not subject to computation of gain or loss under Section 112 of the Act of 1928. The steps taken while seemingly involved, were not taken to cover a cash sale, but were taken with a view to bringing a transaction, which conformed to the statutory intent, clearly within the machinery outlined in the statute and which had to be followed if the statutory plan was to be complied with. If the thing done is not of the character intended to be covered by the statute, it may well be said that mere mechanical compliance

is not enough, but where the mechanical form is prescribed in the statute and the thing done is the thing contemplated by the statute, the fact of mechanical compliance should not be used as an argument to the effect that the mechanical plan adopted, being involved, was therefore a scheme of evasion or avoidance.

Both in the thing undertaken to be done and in the mechanical forms by which it was consummated, the transaction here was a reorganization and under the terms of the statute no present tax liability attached.

It is important finally to point out that Section 112 does not provide for an exemption from tax but is to be read in connection with Section 113 of the Act as a complete plan for fixing the time when taxes are to attach to capital transactions.

Under Section 113(a) (6) this petitioner took the stock of C. Easman Jacobus, Inc. on the basis of the cost to Jacobus individually, of the bus companies' stocks. When subsequent transactions occur in the stock of C. Easman Jacobus, Inc. this means that the petitioner must adopt a computation of gain based upon a cost of $28,500 (Record 2). Any transaction which Jacobus may have individually in the stock of this petitioner or any realizations by way of dissolution of the petitioner, result in a computation for income tax purposes on a basis of cost to Jacobus of the same $28,500. It was the purpose of the taxing act to defer taxes in reorganizations and to impose taxes only at times of ultimate realization. With the policy of that statute, this Court has no concern. Its

duty is to interpret and apply the statute as Congress wrote it.

CONCLUSION

Petitioner respectfully submits that this Court should decide and hold that the transaction upon which the Commissioner is attempting to assert a tax is one within the intent and the terms of Section 112 of the Revenue Act of 1928, that no tax liability attaches thereto, that therefore the case should be remanded to the Circuit Court reversing the judgment of that Court and directing that a mandate issue to the Board of Tax Appeals to enter an order of no deficiency.

Respectfully submitted,

ALBERT E. JAMES,
Attorney for the Petitioner.